Mr. KENNEDY. Mr. President, too often outmoded and inflexible procedures have become obstacles to effective, efficient agency action. The current attention being given the subject of regulatory reform reflects the public dissatisfaction with not only what many agencies are doing, but how they are doing it. It is thus timely for Congress to turn its attention to legislation to improve the administrative procedures of Federal departments and agencies on a governmentwide basis, and I am thus introducing, for myself and the Senator from Maryland (Mr. MATHIAS), five bills to amend the Administrative Procedure Act.

The Administrative Procedure Act, which establishes the general principles and requirements which govern procedures in nearly all Federal agencies, was enacted in 1946. Since that time it has stood substantially unchanged, except for the enactment and subsequent amendment of the Freedom of Information Act. During the 1960's, the Senate Subcommittee on Administrative Practice and Procedure gave lengthy and detailed consideration to proposals for a general revision of the act, but no legislation was enacted. This was due in large part to the differences which emerged between the agencies and the organized bar over the content of specific amendments.

In August 1970 the house of delegates of the American Bar Association adopted 12 resolutions calling in general terms for amendments to the Administrative Procedure Act. These resolutions were referred to the administrative law section of the ABA for the drafting of implementing legislation.

Meanwhile the Administrative Conference of the United States, an advisory body established by statute to study problems of administrative procedure in Federal agencies, initiated its own study of the ABA proposals, while, at the same time, working closely with the administrative law section. At its plenary session in June 1973, the conference adopted a comprethensive statemet addressed to the American Bar Association proposals. This statement was subsequently amplified in some particulars. Stated briefly, the conferenee is in entire or substantial agreement with five of the ABA proposals, is noncommittal on one, and disagrees to a greater or lesser extent with five others. Regarding one of the twelve ABA resolutions relating to pretrial conferences, the conference and the administrative law section agree that legislation is not called for.

Over the past few months, Administrative Conference Chairman Robert Anthony and his staff and ABA representative William Ross and his associates have been meeting together with the staff of the Administrative Practices and Procedures Subcommittee in an attempt to narrow areas of difference and to perfect legislative language to implement the various proposals to amend the Administrative Procedure Act. This has been largely accomplished, and the representatives of the conference and the ABA agree that now is the appropriate time to begin legislative action on these proposals. To begin this legislative process and to facilitate consideration of those proposals by Congress, the agencies, and all other interested parties, I am introducing today a package of bills to amend the Administrative Procedure Act.

S. 796 is supported by both the ABA and the Administrative Conference. It would implement those four of the ABA proposals on which there is entire agreement between the Bar Association and the conference.

Section 1 of the bill would implement the ABA's resolution which called for "providing improved definitions for rule and order which clearly distinguish the nature of rulemaking from the nature of adjudication." This is a matter of considerable theoretical importanee for, as the 1947 Attorney General's manual on the Administrative Procedure Aet points out—

> The entire Act is based upon a dichotomy between rulemaking and adjudication.

The APA's present definition of "rule" 5 U.S.C. 551(4), covers agency statements "of general or particular applicability and future effect" and specifically classifies the approval or setting of future rates as rulemaking. The purpose of the proposed redefinition is to make the distinction between rulemaking and adjudication turn on whether the agency's action is of general or of particular applicability, rather than whether it is of future or of retrospective effect. The general versus particular distinetion seems moro in accord with ordinary understanding and usage.

The Administrative Conference, as I have stated, has endorsed the proposed redefinition. However, it has done so on the understanding that those formal proceedings, particularly ratemaking—which have herctofore been subject to more flexible procedural requirements than ordinary formal adjudication in sections 554, 556, and 557 of the APA—should continue to receive special treatment because of the strong policy component in these determinations. Consequently, a new definition, "ratemaking and cognate proceedings" is contained in the bill. It is intended to cover those proceedings affected by the change in the definition of "rule" and is used elsewhere in the bill to permit the agencies to retain their present procedural flexibility with respect to such proceedings.

Section 2 of the bill is intended to narrow the present exemptions from the requirement in 5 U.S.C. 553, for notice and opportunity for public comment on proposed agency rules. The section would delete entirely the so-called proprietary exemption for matters relating to "public property, loans, grants, benefits, or contracts," and it would cut back the present exemption for rulemaking involving a military or foreign affairs function, so that the exemption would apply only to matters required to be kept secret in the interest of national defense or foreign policy. Agencies would, of course, continue to be able to dispense with notice and opportunity for comment on the basis of a specific finding that such procedures are "impracticable, unnecessary, or contrary to the public interest."

In addition, the bill would make it clear that such a finding may be made by rule with respect to a category of future rulemaking proceedings. I have introduced legislation in previous Congresses which embodied this provision and I am pleased that many agencies have by regulation already adopted the approach of applying notice and comment provisions to loan, grants, public property, and other matters covered by this section. This section would make all agency activities uniform on this point.

Section 3 of the bill would authorize agencies conducting formal proceedings—rulemaking or adjudication—under sections 556 and 557 of the APA to establish appeal boards, make up of agency employees, to review decisions of administrative law judges. It would further authorize the agency to delegate final decisional authority to such boards or to the administrative law judges, subject to discretionary, so-called certiorari-type, review by the agency.

One of the common criticisms of regulatory agencies today is that they are so caught up in the problems of processing and resolving individual cases that they do not have adequate time or energy left for considering the broader questions of regulatory policy. In order to free the agency members of the burden of deciding routine cases, both the ABA and the Conference have recommended that the agencies have authority to delegate final decisions to appeal boards or to the presiding administrative law judge, subject to the agency's right to review cases which appear to the agency to present important issues. Many agencies, among them the ICC, the FCC, and the CAB, have such authority already, either by statute or by reorganization plan. This bill would make a general grant of authority in connection with proceedings governed by sections 556 and 557.

The last section of the bill relates to agency subpena power. The Administrative Procedure Act does not presently contain a grant of subpena power. It does provide that where agency subpena authority exists, subpenas must be made available to private parties in adversary proceedings to the same extent that they are available to agency counsel.

Most agencies which conduct formal proceedings under sections 556 and 557 of the APA do have subpena power. Such power is granted in the agency's organic legislation or in the particular substantive statute under which the proceeding is conducted. A few agencies which conduct such proceedings either have subpena power which is in some way limited or inadequate to the needs of the parties, or have no subpena power at all. These agencies include the Food and Drug Administration, the Postal Service, and the Department of the Interior. The basic purpose of section 4 of the bill is to fill existing gaps by providing within the APA a grant of subpena power for all agency proceedings, both rulemaking and adjudication, which are required to be conducted on the record with opportunity for a hearing. Both the ABA and

the Administrative Conference have concluded that wherever an agency determination is of a nature and importance to justify requiring such formal procedures, all parties should have access to compulsory process for the obtaining of evidence.

S. 797 and S. 798 are alternative bills dealing with the problem of separation of functions. Section 554(d) of the Administrative Procedure Act now provides that an employee engaged in the performance of investigative or prosecutive functions for an agency may not participate in the decisionmaking process, except as witness or counsel, in the same or a factually related case. He cannot, in other words, participate first as an investigator or advocate and then turn around and act as decisionmaker or confidential adviser to the decisionmaker in the same case. This separation-of-functions requirement, however, is applicable only to certain classes of formal adjudications and it is not applicable at all to formal rulemaking.

The ABA proposals apply this provision across the board in all on-the-record proceedings governed by sections 556 and 557. The Administrative Conference has endorsed this approach with a single reservation: In those proceedings not now subject to section 554(d), the bar on participating or advising in the decision will not extend to agency officials who have not personally been involved in the case but who have general supervisory responsibility over employees who have participated in the case. In other words, the general counsel of an agency would not be disqualified from advising the agency members with respect to a formal rulemaking proceeding simply because attorneys in the general counsel's office participated in the hearing. S. 797 represents the ABA position on this question; S. 798 the Administrative Conference position.

S. 799 contains five amendments proposed by the American Bar Association. The Administrative Conference either opposes or remains uncommitted on these. Section 1 would insure that, with limited exceptions, the initial decision in an agency proceeding will be made by the impartial, presiding officer and not by the chief of the agency staff, whose subordinates act as advocates in agency proceedings.

Section 2 is a proposal directed toward improving the efficiency of administrative hearings by establishing, as part of the Administrative Conference, a committee on uniform rules to draft rules of procedure for formal adjudications. This reflects the strongly held views of the ABA that uniform rules would not only save the time of practioners, but would also help ordinary citizens who participate in agency proceedings by rationalizing an unnecessarily confusing aspect of agency practice.

Section 3 would prohibit ex parte communications between agency members and interested persons outside the agency regarding any fact as issue in any formal proceeding. The vices of ex parte communications in on-the-record proceedings are well known, and this section would fill a gap in the law and prohibit absolutely such contacts.

The fourth section provides for abridged hearing procedures where all parties consent, in order to save time and resources of the parties and agencies.

The final section is a provision concerning prejudicial agency publicity. This amendment is directed at the practice employed by some agencies of issuing incomplete information in a matter under review before a full determination of the facts has been made. To the extent that this practice can cause irreparable harm to businesses that were later absolved of wrongdoing, the ABA proposal attempts to stop trials in the press which might tarnish the integrity of agency deliberations.

The final bill in this package is S. 800, a bill to amend chapter 7, title 5, United States Code, with respect to the procedure for judicial review of certain administrative agency action. This bill involves legislative proposals which relate closely to the APA and which both the Bar Association and the Administrative Conference have carefully considered and have supported in the past. Briefly, it would implement three longstanding recommendations of the Administrative Conference by: first, abolishing the defense of sovereign immunity with respect to actions in Federal courts seeking relief other than money damages and stating a claim against an agency or officer acting in an official capacity—conference recommendation 69-1; second, permitting a plaintiff in judicial review proceedings to name as defendant the United States, the agency, the appropriate officer, or any combination of them and liberalizing the venue requirements for such actions—conference recommendation 70-1; and third, eliminating the requirement that there be at least $10,000 in controversy for Federal question jurisdiction under 28 U.S.C. 1331—conference recommendation 68-7.

This legislation was the subject of a comprehensive hearing before the Subcommittee on Administrative Practice and Procedure in June 1970. At that time representatives from the Administrative Conference and the administrative law section of the ABA testified in favor of the bill. The Department of Justice expressed opposition to abolishing sovereign immunity, but indicated that it had no objection to the second and third parts of the bill. The bill was favorably reported by the subcommittee but was not acted on by the Judiciary Committee. I hope we can get action by the Senate on this bill this session.

Mr. President, the subject of these bills has been discussed for over a decade. Two primary sources of information on the various proposals contained in these bills are the fall 1972 "Administrative Law Review," published by the administrative law section of the ABA, which is devoted entirely to this topic, and the 1973–74 report of the Administrative Conference of the United States, largely devoted to these amendments. The introduction to the "Administrative Law Review" [illegible] excellent overview, which I commend to my colleagues; the introduction, written by Mr. Cornelius Kennedy, has been reprinted in the RECORD and can be found on page S4329 of the March 12, 1973 daily edition.

These bills I am introducing will go a long way toward improving the manner in which agencies of the Federal Government administer their responsibilities. I hope they will be acted on in the 94th Congress.

Mr. MATHIAS. Mr. President, I am pleased to join today as a cosponsor of legislation embodying a number of reforms and improvements in Federal administrative procedure.

These bills are the result of efforts by the American Bar Association, the administrative law section, the Administrative Conference of the United States, and those of us in the Senate who have had a sustained interest in administrative law over the years. I have, in the past, sponsored some parts of this package and I am pleased to sponsor all of these bills today.

I do so not with the assurance that I will eventually support all of these measures, but in the anticipation that hearings which will be held in the Subcommittee on Administrative Practice and Procedures will provide an opportunity to review a number of aspects of administrative law and a chance to consider all manner of improvements thereto.

Ours is a massive government which intrudes into almost all aspects of the lives of its citizens. There seems to be no end to the number of agencies and bureaus, regulatory and otherwise. These are a great source of aid and protection to most citizens, but this vast Federal Establishment can also be a web of confusion for many Americans. It is a thicket of uncertainty for others who are unsure of their rights and of the procedures they must follow. While the procedure followed by the Government is a continuous source of activity for many Federal employees and the large Washington legal community, it is often bewildering to the average person.

I must say also that many members of the Federal bureaucracy, of the Washington legal community, and the nearby legal community of Baltimore, have been in the forefront of proposals to reform and simplify the Federal process. I welcome them and commend their efforts in this regard.

I hope that the legislation which we introduce today will result in improvement of the administrative practices of the Government. I believe that these problems have been too long neglected. I believe that we have failed to keep the rule of law at pace with the growth of the Federal bureaucracy. The result has contributed to the skepticism and cynicism about government. I will repeat again what I said over a year ago in connection with a then pending investigation into the procedures of the Cost of Living Council—no process will long retain or deserve popular support if its decisions are not arrived at by a process that is open, fair, consistent, thorough, rational, enforceable, and necessary.